No. 21308

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RONALD E. GATES,
Appellant,

vs.

P. F. COLLIER, INC., a Delaware Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII.

APPELLANT'S REPLY BRIEF

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STATEMENT

As Appellee Collier states "The Basic Facts Are Uncontroverted" (Ans. Br. 2) in this case.

Ex. CC (Op. Br. 75), Ex. DD (Op. Br. 77) and Ex. EE (Op. Br. 79) are based on basic figures supplied by Appellee Collier in response to written interrogatories. It is significant that these figures are not disputed.

Certain facts more minutely stated in the arguments of the Opening Brief are not disputed by Appellee. For example at the bottom of page 44 of said Opening Brief Nork's testimony that "No. 96 was entirely separate from the Japanese Civilian" is not disputed.

A further example is the non-proof of the Japanese embezzlement statute. (Op. Br. 49) The specific facts on pages 50, 51, 52, 53, 54 and 55 of Gates' Opening Brief are not disputed; these all show that there was really no fraud (even if New York law applies, without admitting) because of the reasons stated therein. The minute facts relating to causation of damages, pages 56 to 60 opening brief are also not disputed by Collier.

Appellee Collier attempted to state every alleged relevant fact in its "statement" of 15 pages. (Ans. Br. 1-15) Appellant Gates tried to state the facts in a summary form in nine pages (Op. Br. 5 to 14) but went into detailed facts in the argument. The detailed important facts stated in the argument portion of the Opening Brief remain unanswered. The only inference is that Gates' facts stated in detail in his argument cannot be denied.

REPLY ARGUMENT

(See footnote 1)

I

Appellee Collier's Attempted Answer of Appellant Gates' Contention of Illegality of 1960 and 1961 Contracts under Japanese Foreign Exchange Law Unsatisfactory.

Appellant in his Opening Brief divided his argument of illegality under the Japanese Foreign Exchange Law into parts A, B, C and D as follows:

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1. (Op. Br. . .) means Appellant's Opening Brief at blank page. (Ans. Br. . .) means Appellee's Answering Brief at blank page.

A. "The Japanese Civilian (97B) portion of the contract was absolutely illegal under the Japanese Foreign Exchange Laws." (Op. Br. 17-22)

B. "The U. S. Military 96B portion of the contract was illegal under the Japanese Foreign Exchange Laws." (Op. Br. 22-24)

C. "The Contracts of April 1960 and September 1961 were service contracts which required prior approval." (Op. Br. 24-25)

D. "Illegal to Send Book Orders from Tokyo to New York." (Op. Br. 25-26)

At the trial of the case the above arguments were made in the above order, separately. The trial court rendered its decision on points A and B separately for separate and different reasons. The trial court did not rule on points C and D. Appellee Colliers in its Answering Brief (Ans. Br. 17-18) confuses the question by attempting to lead this court to believe that the trial court consolidated points A and B together in rendering the decision. It was otherwise, A and B were dealt separately.

The trial court held on point A as quoted in foot note 2 below. The portion of the trial court's decision which

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2. "Plaintiff's alternate position is that even so, Gates is not liable to Collier because the contracts, excluding the Australian contract, are void inasmuch as they are in violation of the Foreign Exchange Control of the laws of Japan. The Civil and Commercial Codes of Japan and the Japanese Foreign Exchange and Foreign Trade Control Law were put into evidence.

"When it opened its Japan branch, defendant applied for and secured an Import License from the Japanese government as provided by its law and shipped its encyclopedias and accompanying books to its Tokyo branch at a unit price of $172.50 per set, representing for the purposes of the Japanese Import License that such was 'the full amount of invoice covering cost of books, payable in U. S. Dollars in twelve (12) equal monthly installments * * *.' Payments were made to Collier out of the Tokyo bank account on this basis.

Appellee Colliers quotes on page 17 of Collier's Answering Brief deals exclusively with point B. The trial court made

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"Plaintiff presented three theories upon which he urged the court to find the contracts were void, in that the parties agreed to violate the Japanese Foreign Exchange & Foreign Trade Control Law (J.F.E.):

"1. Because the price charged Gates Co. by the defendant for similar books prior to the April 21, 1960, agreement was $77.87 per set, FOB Ohio, that figure represented the actual cost (plus, of course, some profit) to the defendant for its books, and the difference between that figure and the $172.50 could not possibly reflect the true cost of the shipping and additional charges resulting from Collier's shipping the books to itself in Japan under the new contract.

"2. The percentages of the gross retail sales price to which Gates could be entitled under the contract was 59.5%, leaving Collier's rights to but 40.5%. Thus, Collier's 'cost plus profit' was but $118.31, leaving $54.19 out of the $172.50 to be deposited in dollars to Gates' account in New York (a transfer of funds not allowed under the law).

"3. Gates testified that the $172.50 was deliberately fixed by agreement in order that he might be enabled to get the $54.19 transferred out of Japan."

The above claims were denied by the defendant.

"The price charged Gates Co. prior to the April, 1960, contract has no probative effect in sustaining plaintiff's contention as to the cost of Collier's books shipped to Gates under the contracts. The relationship of the plaintiff and defendant at that time was strictly a buyer and seller relationship. All costs and risks of shipment, sales and collection were borne by Gates as the buyer. Even if the evidence had not shown that Collier's costs had increased about the time of the contracts, this court could not find from the evidence that the $77.87 was in any manner relative to proof of Collier's costs per set under the contracts.

"Nowhere did the plaintiff prove, or even attempt to prove, the actual cost or cost plus profit of any set of books landed and sold in Japan. As stated heretofore, the percentage claimed by plaintiff to represent the respective shares of Gates and Collier in the gross sale price cannot be taken by this court as representing Collier's costs. The only figure which the court can assume as representing Gates' share on every sale was 34%. Gates was entitled to the 7% only when 50% of the purchase price had been paid within 15 months after the order. The 5% was to be paid Gates only for cash sales. The 12.5% was contingent upon the collection loss ratio being less that figure, and the 1% was based upon a certain volume of sales. Thus, every other percentage save the initial sales commission of 34% was a contingent percent. It was manifest to the court from the fact that the percentages were contingent that Collier's costs fluctuated with collections, cash sales and volume. What Collier's costs were

the extensive ruling on point A as quoted in footnote 2 because it was conceded by both parties *that under the Japanese Foreign Exchange Laws an Import License was necessary to convert the Yen received from the book Sales to Japanese Civilians in Japan into U. S. Dollars.* An Import License was actually received by Colliers from the Japanese Government. Appellee Collier's own "Outline of procedure for opening a Branch in Tokyo, Japan" (Plaintiff Exhibit 9) admits that this was necessary. The trial court accordingly found with relation to necessity and extent of an Import License as follows:

> ". . . All yen received were to be deposited in Collier's 'Japan Branch' account in Tokyo. Dollars collected in Tokyo were to be remitted directly to New York. *The amount remitted to Collier in New York on yen collected was to be the amount as limited by Collier's Import License. . . . Collier . . . applied for and received a Japanese Import License so that Collier in New York could be paid for all of the books sent to the Japan office. . . .* Collier's Import License allowed payment to Collier, out of Japan, for the 'full amount of invoice covering cost of books' the sum of $172.50 per set of encyclopedia and accompanying books. The gross sale price of the set of encyclopedia with accompanying books was first fixed at $269.50." (Emphasis ours) (Rec. 690 to 691) 256 F. Supp. 204, 206. 207.

Having so found, the question was whether "*Colliers in its invoices and application to remit funds padded and included in the $172.50 sums illegal to remit.*" (Op. Br. 18) Mathematical percentages and just plain everyday

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under any given hypothesis were never proved by the plaintiff. Furthermore, what Collier's actual costs were on the actual sales made during the contract period were never presented to the court. The plaintiff having failed to show what Collier's true costs were, this court cannot find that the invoice 'cost' price of $172.50, even assuming it was so intended, did in fact violate the J.F.E." (Rec. 700-702).

addition conclusively shows in this case that Gates' monies were sent out of Japan to New York. Furthermore Collier's counsel, Mr. Brown, *admitted* in open court that Colliers paid Gates within the United States in or about the latter half of 1961 the sum of $18,834.24 (U. S. Dollars) on account of the 12½% commission due from Colliers to Gates. (Tr. 385-387) The plain arithmetic is as follows:

1) Split of $269.50 per set of books as provided in the contract of 1960 and 1961 and as illustrated per Plaintiff Exhibit 13 is as follows:

Gates Rights (59.5%)		
34%	$84.83	
7%	17.47	
5%	12.50	
12.5%	33.69	
1%	2.70	$151.19
Colliers Rights (40.5%)		
40%	$118.31	$118.31
Total 100%		$269.50

2) Figure $172.00 was made up of the following:

Colliers Rights		
40.5%	$118.00	$118.00
Gates Rights		
12.5%	34.00	
7%	17.00	
1%	3.00	54.00
		$172.00

The above payment of $18,834.24 was paid out of the total of $204,632.50 which is the sum total of the $172.50 per set of books sent from Tokyo to New York as per Import License. (Op. Br. 52) The confession by Collier's counsel

plus the above mathematical tests show that the trial court was in error. Collier's counsel cannot claim mistake in that Plaintiff's Exhibit 75 further shows 7% bonus payments from Collier to Gates in the United States out of the above mentioned yen remitted as U. S. Dollars the sum of:

$23,357.49
262.05

$23,357.49

This exhibit was prepared and put into evidence by Colliers in its Tokyo District Court case. It again shows conclusively a substantial payment out of the $172.50 licensed payments. Clearly, Gates' 7% commissions were also included in the padded remittances.

Reference is hereby made to pages 18 to 22 of Appellant's opening brief for further detailed argument on this point.

In the face of such plain arithmetic and admissions by Collier, it is submitted that counsel imposes on this court when he argues that a raise in the import license amount from $69.00 per set to $172.50 per set is due only to cost differences. The mathematics of the two contracts of 1960 and 1961 allows Colliers a raise from $69.00 to $118.00 per set. *The balance of $34.00 plus $17.00 plus $3.00 or a total $54.00 were "claimable assets" in Gates' favor. The statute clearly prevented the "direct or indirect transfer" of "claimable assets" unless licensed.* See Article 30 of Japanese Foreign Exchange Law bottom of page 17 of Appellant's Opening Brief.

This case is unlike *Dulles* v. *Katamoto*, 256 F.2d 545, 547 (9th Cir. 1958) (cited at page 18 Ans. Br.), a case relied upon by Colliers, in that with relation to the proof

of Japanese law in said case, no Japanese law of any nature whatsoever was proven. In that case the court stated:

> "Its failure to produce *any such statements of the law or lawyer witnesses*, of the condition of the law makes its contention open to the inference that if produced they would have shown a Japanese American could teach a language foreign to Japan without ceasing to be an American citizen." (Emphasis ours)

In the present case, an official translated copy of the entire Japanese Foreign Exchange Law was offered and received in evidence. (Plaintiff's Exhibit 98) It was not only portions of the law but the Exhibit covered the purpose of the law, precise definitions of terms used in the law, the entire law itself and punitive provisions thereof. And there was no question that the said law applied to Colliers in that Colliers did receive an import license thereunder permitting remittances of $172.50 per set. A total of $204,632.00 (U. S. Dollars) was remitted under said import license. (See list footnote 10, page 52 of Opening Brief.)

Appellant also relies (Ans. Br. 18, 19) on *Application of Chase Manhatten Bank*, 191 F. Supp. 206, 209, but the decision on appeal of the Second Circuit Court of Appeals (297 F.2d 611) in said case clearly shows that what was supplied by the Panama attorney witness in the Bank case was agreed upon by the Colliers and Gates in the present case. In the said Chase Manhatten Bank case the statute was produced and the attorney witness was produced. He testified only as follows:

> ". . . Chase (Bank) produced Senor Carlos Icaza, its Panamarian counsel. He testified that in his opinion Chase could not respond to the subpoena without subjecting itself to penalties under the Panamarian law and that American authorities could gain access to Panamarian records of American firms only by making

> application through the Panamarian courts. He also stated that Law No. 17 is the only Panamarian law containing sanctions with respect to production of records in response to foreign process and that a violation of the Panamarian law would be equivalent to a misdemeanor under our criminal law. The government offered no evidence." 297 F.2d 611, 613.

The applicability of the Japanese Foreign Exchange Law to Colliers as above stated was clear and both Gates and Colliers agreed to this. In fact an Import license was obtained by Colliers in compliance therewith. The only question therefore was—the sudden raise from $69.00 to $172.50 of the licensed amounts—was there any padding therein?

The Court of Appeals, Second Circuit, said in the said *Application of Chase Manhatten Bank* at 297 F.2d 613, with respect to laws of friendly nations and attempts to circumvent said laws by United States companies as follows:

> "In the instant case, the Government argues that compliance will not violate Panamarian law, since the subpoena is not directed to personnel in Panama but only to the head office in New York. . . . However, this would be nothing more than an attempt to circumvent the Panamarian law. *Such a maneuver scarcely reflects the kind of respect which we should accord to the laws of a friendly foreign sovereign state. Just as we would expect and require branches of foreign banks to abide by our laws applicable to the conduct of their business in this country, so should we honor their laws affecting our bank branches which are permitted to do business in foreign countries.*" (Emphasis ours)

It is requested that this court declare Collier's disgraceful "maneuver" with the Japanese Foreign Exchange Law illegal. Collier's it seems is accustomed to black market transactions ("Yami" in Japanese, meaning transac-

tions in the dark) in that it admitted paying $.25 more per dollar to get money out by "maneuvers" out of Egypt. (Plaintiff's Exhibit 118) As stated by the Second Circuit in the above Chase Manhatten quotation, just as we would expect and require branches of Japanese business to abide by our laws applicable to the conduct of their business in this country, so should we honor their laws affecting our United States businessmen who are permitted to do business in Japan. This court which must deal most closely with Pacific International problems should be the first to condemn the obvious "maneuver" Colliers attempted with the Japanese Foreign Exchange Law in this case. Plaintiff's Exhibit 9, "Procedure for Opening Tokyo Branch Japan" prepared by Colliers is a masterpiece on instructions on how to get around or "maneuver" the Japanese Foreign Exchange Law.

Therefore it is submitted Appellant Gates clearly sustained point A of his argument of illegality.

With respect to points B, C and D of Appellant Gates' contentions of illegality, it is submitted that since the complete Japanese statute was introduced in evidence and Colliers admitted that it is applicable to it and operated thereunder in Japan through its Tokyo office, the absolute prohibitions of the act as shown in the arguments B, C and D pages 22 to 26 of Appellant Gates" Opening Brief are applicable. If Colliers was licensed to ship out U. S. Dollars collected in Tokyo, Japan, it was Collier's burden and duty to produce it. In the absence of such production, the inference is that it had no such license. *Runkle* v. *Burnham*, 153 U.S. 216, 14 S. Ct. 837, and if there are any Japan court decisions or regulations to take Colliers out of the prohibitions in the Statute, Colliers had the burden of proof. It is stated in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 822, 68 S. Ct. 822, 827:

> "First, the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits, requires that respondent undertake this proof under the proviso of §2(a)."

See: *Javierre* v. *Central Altagracia,* 217 U.S. 502, 30 S. Ct. 598; *Schlemer* v. *Buffalo R. Co.,* 205 U.S. 1, 27 S. Ct. 407; 20 Am. Jur. 148. Such Japanese decisions on regulations, if any, are "facts" and must be proven by Collier as such. *Philip* v. *Macri,* 1958, C.C.A. 9, 261 F.2d 945, 75 A.L.R. 2d 523.

Since Appellee Colliers does not answer arguments C and D, it must be taken that Collier concedes that Appellant Gates' position taken in C and D are so sound that Colliers cannot answer them. See: *Mower* v. *Street,* 79 Ariz. 282, 288 P.2d 495.

Appellee Colliers concedes by the position it takes in its Answering Brief that Appellant Gates' arguments in paragraph II of Appellant Gates' Opening Brief pages 26 to 27 are correct. It is entitled "Effect of Illegality of Contracts of April, 1960 and September, 1961", and the law laid down in *Bulkin* v. *Reinfeld,* (1956 C.C.A. 2) 229 F.2d 215, cert. den. 325 U.S. 844, 77 S. Ct. 50, is quoted. Colliers doesn't dispute Gates on this point but Point I of Collier's Answering Brief pages 16 to 19 is based on the correctness of Gates' position in paragraph II of his Opening Brief.

As for paragraph III of Appellant Gates' Opening Brief pages 29-32 entitled "Count I of Plaintiff's Complaint in Quantum Meruit Permits Recovery Where Alleged Wrong Is Malum Prohibitum." Counsel, Mr. Brown, admitted the correctness of Appellant's argument in paragraph III (Tr. 471) and since he does not answer it, it

must be taken that Colliers does not dispute Gates' argument in paragraph III. A non answer is taken as an admission of the correctness of Gates' argument. See *Mower* v. *Street,* 69 Ariz. 282, 288 P.2d 498. Neither does Collier dispute the figures submitted by Appellant Gates in the event a quantum meruit recovery is allowed. (Op. Br. 31, 32)

II

Japanese Law Governed Questions of Fraud and Breach of Contract.

Appellee Collier in its Answering Brief at page 19 states as follows:

> "But the law of New York properly applies to the issues of Gates' fraud and breach of contract. Accordingly, there was no necessity for Collier to prove the law of Japan to establish its defense and counterclaims."

Appellant disagrees. First of all in relation to conflicts of law on contracts the Supreme Court of Hawaii in the case *In re Frances de Flanchet,* 2 Haw. 96, 109, held as follows:

> "A different rule obtains in relation to contracts. Justice is to be administered in our Courts according to our laws and forms of proceeding, though the action be founded on a contract made in another State or country, the *lex loci* applying only to the construction and effect of the contract. Every country has its own modes of redress and judicial proceedings peculiar to its own jurisprudence. The *lex loci* has reference to the nature and construction of the contract, and its legal effect, and not to the mode of enforcing it. Justice demanded that this comity should exist between nations, and it has become incorporated into the Code of National Law in all civilized countries. (14 Johnson's Rep., Cowp., 343; 1 Johnson's Cases, p. 140; 1 Gallison's Rep., 371.)"

Appellee Collier's assertion that there is no Hawaiian case on the subject is misleading. The "Lex loci" in a contract case is so well expressed in the quotation from 50 A.L.R. 2d 254, pages 33-34 of Gates' Opening Brief that it will not be repeated herein. More recently in *Sperry Rand Corporation* v. *Industrial Supply Corporation,* (C.C.A. 5) (1964) 337 F.2d 363, the court stated:

> "The Supreme Court has stated, as the general conflicts rule pertaining to contracts, that matters bearing upon the execution, interpretation and validity of a contract are determined by the law of the place where it is made; matters connected with its performance are regulated by the law prevailing at the place of performance; and matters respecting the remedy depend upon the law of the place where the suit is brought. Scudder v. Union National Bank, 91 U.S. 406, 23 L. Ed. 245."

That the intention of the parties was that the Law of Japan should apply to the contracts of 1960 and 1961 is clear from the following provision contained in "Procedure For Opening Tokyo Branch Japan." (Plaintiff Exhibit 9)

> "10. *Salesmen—Independent Contractors*:
>
> The law (meaning the law of Japan) governing free lance is basically very similar to that in the United States in that a free lance salesman dealing strictly on a commission basis will be considered an independent contractor, and the company would not be liable to third parties as employer." (page 4)

"7. *Japanese Bank Account*:

(d) All yen collected will be deposited, but the amount remitted will be the amount limited as per our Import License" (page 3)

"8. *Tax Liability*:

As advised by Tokyo Attorney, Mr. James S. Adachi, the Branch of a foreign corporation in Japan is treated as a separate entity. . . ." (page 4)

It is submitted that the foregoing was equivalent to a stipulation in the contract that the parties shall be governed by Japanese Laws. Parties may agree in their contracts as to what law shall apply. 16 Am. Jur. 2d 71, Section 46. *Aluminum Co.* v. *Hully,* (C.C.A. 8) (1952) 200 F.2d 257; *Overseas Trading Co. S.A.* v. *United States,* 141 Ct. Cl. 561, 159 F. Supp. 382; *Boole* v. *Union Marine Ins. Co.,* 52 Cal. App. 207, 198 Pac. 416.

Appellee Collier attempts to argue that the "center of gravity" or "grouping of contracts" rule should govern this case. (Ans. Br. 23) But in the very jurisdiction (N.Y.) Appellant Collier says the laws whereof should apply, the "center of gravity" or "grouping of contracts" rule is subject to a recognized exception that when the parties contract with the law (Statutory) of some particular jurisdiction in view, the law of that jurisdiction will be applicable in determining the interpretation and validity of the contract, as the law which the parties presumably intended to be controlling. *Hausman* v. *Buckley,* (C.C.A. 2) (1962) 299 F.2d 696, 93 A.L.R. 2d 1340. In the said case, a derivative action by a minority shareholder of a Venezuelan Corporation was dismissed for the following reasons:

". . . Thus defined, we think it is clear that Appellants' position cannot prevail. A rule which provides that the enforcement of corporation claims through derivative actions must be undertaken pursuant to the will of a majority of its stockholders reflects a deliberate policy that such actions ought to be brought not only when the claims may have merit but when the stockholders, as a body, are of the opinion that the corporate welfare is best promoted by suing upon them. The issue is not just 'who' may maintain an action or 'how' it will be brought, but 'if' it will be brought." . . .

"'*But a statute of the place where the right arose may impose upon it a condition which goes to its substance,* and, when this is so, the condition will be observed elsewhere. This has ordinarily come up in the case of statutory rights in which the limitation was imposed by the same statute which created the right itself. . . . But it is not necessary that the limitation should be in the same statute, so the purpose be plain to make it a condition.' Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d 941, 942-943 (C.C.A. 2, 1930) (L. Hand, J.)." (Emphasis ours)

See also:

Pinney v. *Nelson,* 183 U.S. 144, 22 S. Ct. 52.

Levy v. *Daniels U-Drive Auto Renting* Co., (1928) 108 Conn. 333, 143 Atl. 163.

Bradford Electric Light Co., v. *Clapper,* (1932) 286 U.S. 145, 52 S. Ct. 571 (Rt. by way of defense).

Broderick v. *Rosner,* 294 U.S. 629, 55 S. Ct. 589.

Broderick v. *McGuire,* (1934) 119 Conn. 83, 174 Atl. 314.

In the present case the contract contemplated sales in Japanese Yen and it contemplated conversion of said yen into U. S. Dollars. As admitted by the parties, an Import

License was absolutely necessary and the Japanese Foreign Exchange Control Act was interwoven in the contract. Charges of fraud by Colliers necessarily involved defenses by Gates involving the said Exchange Act. See arguments VI (B)(C), pages 49-61, Op. Br. Both of the Japan Sales Contracts between Gates and Colliers would have been useless if Colliers couldn't get U. S. Dollars out of Japan. The Japanese Foreign Exchange Act was the backbone of the Tokyo contract and it was as much a part of the contract as the law of Venezuela was with relation to shareholder's rights of Venezuelan corporations in *Hausman* v. *Buckley* abovementioned. Where foreign statutes are involved the courts will enforce the foreign statutes together with the law of that country (Japanese law in the present case).

The foregoing exception stated in *Hausman* v. *Buckley* applies to tort cases as well. See: *Bradford Electric Light Co.* v. *Clapper, supra; Pearson* v. *Northeast Airlines,* (C.C.A. 2) (1962) 309 F.2d 553, 92 A.L.R. 2d 1162.

And finally just for argument, without admitting, if the "center of gravity" theory is to be applied in this case Japan was the "center of gravity", the place *"which has the most significant contacts with the matter in dispute"*. The case of *Auten* v. *Auten,* (1954) 308 N.Y. 155, 124 N.E. 2d 99, relied upon by Colliers on page 23 of its Answering Brief was a case involving domestic relations. In that case the court based its decision on the marital situs of the parties, England. The center of gravity of the contracts in this case is what the parties in their contract designated by agreement as headquarters of the "Asiatic Division of Collier" (Plf. Ex. 1 and 2), that is to say Tokyo, Japan; Colliers registered itself under the Japanese laws intending to be covered in its activities by the Japanese law and treated as a separate entity (Plf. Ex. 9 page 4); it paid Japan income

taxes; Gates had purchased a place of business as well as a home in Tokyo, Japan; Gates was to sell in Japanese Yen and convert it into U. S. Dollars (In *Auten* v. *Auten, supra,* the court emphasized that payments were to be in pounds); the remittances were governed by the Japanese Foreign Exchange Act by Import Licenses; the alleged fraud (if any) all took place in Japan; Colliers received its licensed import payments as per license in the total sum of $204,632.50 (Op. Br. 52); Colliers complains in this case that the alleged defrauded amounts should have been deposited in Collier's Tokyo bank account, in other words the alleged non-payment (if any) took place in Tokyo; the Japanese court in Tokyo issued an injunction when a dispute arose; the effect of this Japanese Court Injunction is one of the critical issues in this case (Op. Br. 39); Colliers and Gates first sued each other in the Japan courts on this cause of action; Collier's 15 independent contractor salesmen (determined as per agreement by Japanese law) in Japan were Japanese; basic records of the business were kept in Japanese; Colliers maintained an inventory of books in Japan; sales were made in Japan; a complicated debtor and creditor relationship in Japanese Yen developed in Japan between Gates and Collier (Tr. 89-90); the multitude of buyers were Japanese; Collier's auditors audited Gates' books in Japan; most Collier report forms were filled in and made in Japan; collections were made in Japan and all other acts incident to all the foregoing were all done in Japan. In such cases, even under the center of gravity cases, the law of the place where the goods were sold becomes applicable. See especially *Sperry Rand Corporation* v. *Industrial Supply Corporation,* (C.C.A. 5) (1964) 337 F.2d 363 where the court held the law of Florida where the computer mechanism was sold as being applicable and stated:

"In Pennsylvania the law of the place of performance would govern. Victorson v. Albery M. Green Hosiery Mills, Inc., 3rd Cir. 1953, 202 F.2d 717, 41 A.L.R. 2d 806; Texas Motorcoaches v. A.C.F. Motors Co., 3rd Cir. 1946, 154 F.2d 91. Such is also the rule of Delaware. Fairbanks, Morse & Co. v. Consolidated Fisheries Co., 3rd Cir. 1951, 190 F.2d 817. The same doctrine is said to apply in Ohio. Delta Tank Manufacture Co. v. Weatherhead Co., D.C.N.D. Ohio, 150 F. Supp. 525, aff. 6th Cir. 1958, 254 F.2d 602. In New York the newly developed center of gravity theory would be applicable. Royce Chemical Co. v. Sharpless Corporation, 2nd Cir. 1960, 285 F.2d 183; Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99, 50 A.L.R. 2d 246.

"The modern text writers seem to favor the *application of the law of the situs of the property at the time of the sale.* See 15 C.J.S., Conflict of Laws, § 18d, pp. 929-930, 11 Am. Jur. 355, Conflict of Laws, § 69; 2 Beale, Conflict of Laws 981 et seq., §§ 255.5, 256.1-258.1; Lalive Transfer of Chattels in the Conflict of Laws 48-59, 142; Carnahan, Tangible Property and the Conflict of Laws, 2 U. of Chi.L.Rev. 345; Rest. Conflict of Laws, §§ 255-259." (Emphasis ours)

See also *Royce Chemical Co.* v. *Sharpless Corporation,* (C.C.A. 2) (1960) 385 F.2d 183, where a New York seller of a textile centrifugal machine sold said machine to a New Jersey buyer. The machine didn't work and buyer sued seller in the Federal District Court of New York (S.D.) on rescission for fraud. The court held:

"(1, 2) Under Klazon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477, we are obliged to apply the conflict of laws principles of New York, the state in which the district court sat. We agree with that court that under New York's conflicts rules, Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99, 50 A.L.R. 2d 246, the law of New Jersey is applicable here."

"(9, 10) We must apply the conflicts rule as would a New York court. We believe that under the 'center-of-gravity' theory of Auten v. Auten, supra, the New York courts *would apply the law of New Jersey—the state with the most significant contacts—to the question of interest as an item of damage, as well as to other questions relating to the contract's performance.* Cf. Restatement, Conflict of Laws, §§ 358, 413, 418; Blankenship v. Rountree, 10 Cir., 238 F.2d 500." (Emphasis ours)

Therefore appellee Colliers by its failure to prove the substantive law of fraud of Japan completely failed in its proof of its case.

III

Appellee Colliers Did Not Show Contracts Were Separate nor Divisible.

Appellee Colliers in its Answering Brief at page 25, searches the trial court's decision attempting to locate the trial court's finding that the 96B (Military), 97B and 99B (Japanese Civilian and Schools) and 98B (Australian) contracts were not separate contracts, nor were they divisible. Its quoted portion of the trial court's opinion fails to make a finding of divisibility or separateness.

The trial court found with relation to the Australian contract as follows:

"Towards the end of 1961, Collier and Gates decided to open up a Collier branch in Australia, and did so in January, 1962. However, as to the Australian operation it was agreed that Gates would act as an independent contractor and not as an employee of Collier and would be entitled to a 36% basic sales commission. Collier would open its own branch there to handle only the cash accounts receivable and the inventory of books, all sales to be under the control of Gates." (Rec. 692)

Therefore the court did find the Australian operation to be covered by a separate contract.

But assuming that the trial court found as Collier contends, as for Collier's attempt to rely on the "clearly erroneous" rule regarding fact findings, Appellant Gates submits that where as in this case most of the evidence is documentary and undisputed, and the question involves not only facts but it is necessarily one of fact and law, the said "clearly erroneous" rule is not applicable. It is submitted that when facts are undisputed, though no finding is made, case need not be remanded. *Yanish* v. *Barber,* (1956) (C.C.A. 9) 232 F.2d 939. Trial Court's findings of fact induced by an error of law are not binding. *Smallfield* v. *Home Ins. Co. of N. Y.,* (C.C.A. 9) 1957, 244 F.2d 337. When findings essentially deal with effect of certain transactions or events, rather than resolving disputed facts, appellate court not bound by "clearly erroneous rule". *Stevenot* v. *Norberg,* C.C.A. 9, 1954, 210 F.2d 615. Where all of the evidence is documentary Court of Appeals not limited by findings below on factual questions, *Agrashell Inc.* v. *Bernard Sirotta Co.,* (C.C.A. 2) (1965) 344 F.2d 583. Findings which were unsupported by the record, findings which were conclusions of law and ultimate findings or mixed findings of fact and law were not binding on court of review. *Official Creditors Committee of Fox Markets Inc.* v. *Ely,* (C.C.A. 9) (1964) 337 F.2d 461, cert. den. 85 S. Ct. 1342, 380 U.S. 978; *Weible* v. *U. S.,* (C.C.A. 9) (1957) 244 F.2d 158.

It is submitted that Collier's inadequate attempted answer to Gates' argument of divisibility shows that Colliers has "no reply" to Gates' argument.

IV

Appellee Colliers Cannot Dispute Appellant Gates' Following Unanswerable Arguments.

It is significant that because of the overwhelming law and undisputed facts (documentary as well as agreed facts) in favor of Appellant Gates, Appellee Colliers cannot and did not answer the following points raised by Appellant Gates in his Opening Brief:

(Numbers correspond to those in Opening Brief.)

I. The April, 1960 and September, 1961, Gates-Collier Contracts Were Flagrant Violations of the Foreign Exchange and Foreign Trade Control Law of Japan.

C. Contracts of April, 1960 and September, 1961, Were Service Contracts Which Required Prior Approval. (Op. Br. 24, 25)

D. Illegal to Send Book Orders from Tokyo to New York. (Op. Br. 25, 26)

II. Effect of Illegality of Contracts of April, 1960 and September, 1961. (Op. Br. 26-28)

III. Count I of Plaintiff's Complaint in Quantum Meruit Permits Recovery Where Alleged Wrong is Malum Prohibitum. (Op. Br. 29-32)

V. Trial Court Erred in Finding That the Tokyo District Court Pro-Tem Decree Was Fraudulently Obtained. (Op. Br. 39-42)

VI. Assuming That Appellant's Arguments in Paragraphs I, II, III, IV and V of this Brief Are Untenable, Colliers' Evidence Was Insufficient to Sustain Court's Judgment on Counterclaim and Colliers Did Not Prove Any Defense of Fraud.

B. Colliers' Exhibits B-13A, B and C Were Only Book Entries; No Conversion Was Proven, Therefore No Action in Fraud May Be Maintained. (Op. Br. 49-56)

C. Colliers Failed to Prove Alleged Fraud Proximately Caused Pecuniary Losses. (Op. Br. 56-60)

D. Colliers Rescinded Its Contract of September, 1961 and Cannot Sue for Future Liabilities to Arise under Said Contract. (Op. Br. 60)

It is submitted that where Appellee Colliers failed to answer the Appellant's brief, such a failure is a confession on the part of Appellee of reversible error. *Mower* v. *Street*, 79 Ariz. 282, 288 P.2d 495.

And as in this case, where most of the facts are undisputed, the case need not be remanded. This court may make proper findings. *Yanish* v. *Barber*, (C.C.A. 9) (1956) 232 F.2d 939. Appellee on page 2 of its Answering Brief states in bold dark type: "The Basic Facts Are Uncontroverted."

CONCLUSION

For the reasons abovestated, it is submitted that the decision of the court below should be set aside and judgment for the amount $422,804.98 should be entered in favor of Appellant and against Appellee. The figures in Ex. CC page 75 Op. Br. are figures obtained from figures admitted by Colliers in answers to interrogatories. (Rec. 114 to 279) Even if Appellant was once only an Oregon orphan boy he should not be deprived of his just commissions after selling $1,810,262.00 worth of books. Colliers received $1,004,644.22. (Ex. E.E., page 79 Op. Br.) Gates

has received only $398,434.71. (Ex. E.E. aforesaid) Gates' request is not only just but mathematically correct.

Dated: December 9, 1966.

Respectfully submitted,

KASHIWA AND KASHIWA

By .....
SHIRO KASHIWA
Attorney for Appellant

CERTIFICATION OF CONFORMITY

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

KASHIWA AND KASHIWA

By .....
SHIRO KASHIWA
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